

The Political Morality of the Eighth Amendment

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Since the early twentieth century, the Supreme Court has interpreted the Eighth Amendment prohibition against cruel and unusual punishment as a progressive mandate that draws its meaning from "the evolving standards of decency that mark the progress of a maturing society." In applying this standard, the Court looks to such objective considerations as legislative enactments, patterns of jury decision making, and international opinion as measures of contemporary values. At the same time, the Court intermittently invokes its "own judgment" as an independent gauge of constitutionality. This article assesses the viability of the "evolving standards" doctrine, concluding that, as presently conceived, it has produced an incoherent Eighth Amendment jurisprudence. In particular, by relying on majoritarian factors as a test of constitutionality, the Court has misconceived the nature and significance of a constitutional right. For in its zeal to avoid the charge that the subjective policy preferences of individual justices drive its decision making, the Court has embraced a form of moral skepticism that is inconsistent with the history and character of the Constitution. Despite the Court's missteps, the evolving standards formulation is worth preserving because it highlights a number of important liberal-democratic values. According to this alternative conception, the touchstone of Eighth Amendment analysis is neither political popularity nor personal morality but the political morality of our liberal democracy—the best account of how our political values should shape and constrain the institution of punishment.

I. INTRODUCTION

In a series of high-profile decisions beginning in 2002, the Supreme Court has interpreted the Eighth Amendment¹ to forbid application of the death penalty to mentally retarded offenders,² to sixteen- and seventeen-year-old offenders,³ and to

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¹ U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

² *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

³ *Roper v. Simmons*, 543 U.S. 551, 578–79 (2005).

child rapists who do not also kill their victims.⁴ Most recently, the Court has held that sentencing juvenile offenders to a term of life without the possibility of parole is also cruel and unusual for any offense short of homicide.⁵ While critics on and off the Court have sought to highlight the shortcomings of the reasoning in these cases,⁶ many welcome what they take to be a more progressive turn in the Court's Eighth Amendment jurisprudence.⁷ In particular, as the Court chips away at the categories of offenders and offenses eligible for capital punishment, the foundations for the most severe penalties may yet be undermined.

For those who believe that criminal sentences in the United States are unduly harsh, it is natural to celebrate these developments. Trends in criminal justice policy since at least the 1980s have otherwise consistently reflected a get-tough approach that has dramatically increased the length of sentences for virtually all offenses, especially for repeat offenders who run afoul of the popular "three-strikes" provisions.⁸ Indeed, despite the handful of "progressive" decisions regarding the death penalty and juvenile life sentences, the Court has generally facilitated the trend toward severity in sentencing by deferring to legislative judgments about the nature, purposes, and application of punishment.⁹

At the heart of these developments lies the Court's controversial approach to determining what counts as "cruel and unusual" punishment. Throughout the twentieth century and since, the Court has maintained that the Eighth Amendment is not static but must "draw its meaning from the evolving standards of decency that mark the progress of a maturing society."¹⁰ In applying this standard, the Court looks to such "objective indicia" as legislative enactments, patterns of jury decision making, and international opinion as measures of contemporary values.¹¹ Finally, it considers "its own independent judgment whether the punishment in question violates the Constitution."¹² In this way, the Court has sought to respect the enlightened spirit of the Eighth Amendment while grounding its judgments in objective criteria.

⁴ Kennedy v. Louisiana, 128 S. Ct. 2641, 2664–65 (2008).

⁵ Graham v. Florida, 130 S. Ct. 2011, 2034 (2010).

⁶ See discussion *infra* Part III.

⁷ Sara F. Werboff, *Halting the Sudden Descent into Brutality: How Kennedy v. Louisiana Presents a More Restrained Death Penalty Jurisprudence*, 14 LEWIS & CLARK L. REV. 1601, 1644–45 (2010); John D. Bessler, *Revisiting Beccaria's Vision: The Enlightenment, America's Death Penalty, and the Abolition Movement*, 4 NW. J.L. & SOC. POL'Y 195, 321–22 (2009).

⁸ See MICHAEL TONRY, THINKING ABOUT CRIME: SENSE AND SENSIBILITY IN AMERICAN PENAL CULTURE 8–9 (2004).

⁹ See, e.g., Ewing v. California, 538 U.S. 11, 29–30 (2003) (deferring to the California legislature's enactment of a "three strikes" law); Lockyer v. Andrade, 538 U.S. 63, 73, 76–77 (2003) (noting criminal sentences are only cruel and unusual under a proportionality test in "exceedingly rare" and "extreme" cases while upholding a criminal sentence under a state "three strikes" law).

¹⁰ Trop v. Dulles, 356 U.S. 86, 101 (1958).

¹¹ Roper v. Simmons, 543 U.S. 551, 561–63 (2005).

¹² Graham v. Florida, 130 S. Ct. 2011, 2022 (2010).

Despite these worthy aims, the Court's Eighth Amendment jurisprudence is woefully misconceived. Its reliance on objective measures of contemporary values stacks the deck in favor of majoritarian outcomes and is thus at odds with the nature and significance of a constitutional right. Moreover, where outcomes have deviated from majority preference, they seem ad hoc, giving rise to the suspicion that they reflect nothing so much as the justices' personal policy preferences—in the guise of the Court's own judgment or the weight of international opinion. The resulting doctrine is at once both insufficiently protective of the rights of criminal offenders and largely devoid of meaningful standards for justifying—or even evaluating—the Court's controversial judgments.

What is the alternative? Some critics of the Court's "evolving standards" analysis deny altogether the relevance of contemporary values to Eighth Amendment interpretation.¹³ From this originalist perspective, the Court should focus not on prevailing state practice or international opinion but on the historical sources and context of the prohibition on "cruel and unusual" punishment. Others have argued that the Court's assessment of prevailing public sentiment is misleading because popular support for harsh penalties is uninformed by the actual operation of the justice system.¹⁴ On this view, many people would withdraw their support for the death penalty and other harsh punishments if they understood how the system actually works.¹⁵ Finally, some observers see in the Court's Eighth Amendment decisions simple politics—the personal policy preferences of particular justices or their rough-and-ready sense of the public mood.¹⁶

While these accounts point to various limitations in the Court's Eighth Amendment jurisprudence, I argue that the "evolving standards of decency" formulation highlights important liberal-democratic values and is thus worth

¹³ See, e.g., *Roper*, 543 U.S. at 608 (Scalia, J., dissenting) (characterizing as "wrong" the Court's reliance on "evolving standards" and evidence of a "national consensus"); John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 Nw. U. L. REV. 1739, 1746 (2008) (advocating that Eighth Amendment interpretation focus on "unusual" punishments as determined with reference to "longstanding traditions").

¹⁴ See, e.g., *Furman v. Georgia*, 408 U.S. 238, 363 (1972) (Marshall, J., concurring) ("I believe that the great mass of citizens would conclude on the basis of the material already considered that the death penalty is immoral and therefore unconstitutional."); Carol S. Steiker, *The Marshall Hypothesis Revisited*, 52 How. L.J. 525 (2009) (defending, despite her own initial misgivings, Marshall's hypothesis that an informed public would turn against the death penalty).

¹⁵ See *supra* note 14.

¹⁶ *Atkins v. Virginia*, 536 U.S. 304, 338 (2002) (Scalia, J., dissenting) ("Seldom has an opinion of this Court rested so obviously upon nothing but the personal views of its Members."); Heidi M. Hurd, *Death to Rapists: A Comment on Kennedy v. Louisiana*, 6 OHIO ST. J. CRIM. L. 351, 363 (2008) ("[O]ne cannot help but suspect at the end of the day that it is the Court's core conviction that death is undeserved by anyone who does not cause death that best explains the Court's decision."); Corinna Barrett Lain, *Lessons Learned from the Evolution of "Evolving Standards"*, 4 CHARLESTON L. REV. 661, 675 (2010) ("On both ends of the ideological spectrum, the [j]ustices' policy preferences are strong and rigid, and neither the law nor anything else is likely to make a dent."); *id.* at 676–77 (noting that "moderate" justices are "highly responsive to changes in public opinion on salient issues like the death penalty").

preserving. For although the prohibition on cruel excess establishes what is forbidden in punishment, it is the commitment to decency that reminds us what is required. By the same token, reference to the “progress of a maturing society” signals that the standard is aspirational, exhorting us to resist inhumanity in criminal punishment. Taken together, these considerations suggest a moral framework for Eighth Amendment analysis. The touchstone is neither political popularity nor personal morality but the political morality of our liberal democracy—the best account of how our political values should shape and constrain the institution of criminal punishment.¹⁷

To make this case, I begin by reviewing the Court’s Eighth Amendment jurisprudence, focusing on the development of the evolving standards test in the twentieth century. Before then, the Court had little occasion to interpret the prohibition on cruel and unusual punishment; once it did, it rejected the notion that its meaning was fixed by eighteenth-century conceptions of cruelty.¹⁸ This set the stage for the evolving standards test that dominates modern Eighth Amendment analysis. The central failing of this approach is the determination that in order to be objective, a standard must be quantifiable or otherwise uncontroversially measurable. This has led the Court to overvalue majority opinion while neglecting more relevant considerations. In particular, by treating evolving standards as an empirical rather than a normative test, the Court obscures the moral dimension of its own analysis. The resulting doctrine lacks coherence and legitimacy, producing outcomes that are unjust—or at least unwarranted by the Court’s stated rationale. Whether we lament or celebrate particular Eighth Amendment decisions, we should be deeply troubled by the process that produces them.

In place of its specious reliance on “objective indicia” of contemporary values, the Court must develop greater confidence in its “own judgment.” Serious attention to the “evolving standards of decency that mark the progress of a maturing society” will engage the Court in a rigorous moral analysis of what it means to stand against cruelty in punishment and insist on decent treatment for criminal wrongdoers. This will require the Court to shed its moral skepticism—the implausible view, implicit in much of its Eighth Amendment jurisprudence, that morality is inherently subjective, the pursuit of moral truth necessarily futile. For, despite the allure of the skeptical posture, it is out of place in our political morality.

The alternative analytical framework will not produce unassailable Eighth Amendment decisions; nor will it be possible to know in advance what specific outcomes it will yield. But an Eighth Amendment jurisprudence grounded in our political morality provides the basis for evaluating even controversial judgments by establishing the relevant terms of the debate. To that end, I will sketch what I

¹⁷ See RONALD DWORKIN, *LAW’S EMPIRE* 260–61 (1986) (defending a role for political morality in constitutional interpretation and rejecting the charge that it is subjective).

¹⁸ *Weems v. United States*, 217 U.S. 349, 378 (1910) (adopting “progressive” interpretation of the Eighth Amendment); *Lain*, *supra* note 16, at 664–65 (noting the small number of Eighth Amendment cases prior to the 1970s).

take to be the general contours of our political morality based on a recognition of the equal moral worth of persons as a status inherent in our humanity. In the context of punishment, this requires a rejection of cruelty and a commitment to decency in the treatment of criminal offenders. Thus, "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man."¹⁹ Accordingly, Eighth Amendment analysis should reflect the kind of people we are—or aspire to be—and the treatment of offenders that entails, calling offenders to account without displaying the vice of cruelty characteristic of the offenses themselves.

II. THE DEVELOPMENT OF "EVOLVING STANDARDS OF DECENCY"

In its earliest interpretations of the Eighth Amendment, the Supreme Court adopted the view that the prohibition on "cruel and unusual" punishment was specifically intended to forbid the infliction of torture as a form of punishment in the United States. Relying on the Framers' understanding of the identical language in the English Declaration of Rights of 1689, the Court concluded that "punishments of torture . . . and all others in the same line of unnecessary cruelty, are forbidden by that [A]mendment to the Constitution."²⁰ In retrospect, it is unclear whether the Framers' understanding of the English provision was historically accurate.²¹ But in any case, because the infliction of such torturous punishments as "burning at the stake, crucifixion, breaking on the wheel, or the like"²² were not used in America, the Court's torture-based interpretation effectively rendered the Eighth Amendment a nullity.

In 1910, however, the Court revisited its earlier analysis. In *Weems v. United States*,²³ it considered an Eighth Amendment challenge to a sentence of fifteen years at hard labor while chained at the ankle and wrists for the crime of falsifying a public document.²⁴ The Court noted the English source of the "cruel and unusual" formulation but concluded that its application must be broader in scope "than the mischief which gave it birth."²⁵ For surely the Framers "intended more than to register a fear of the forms of abuse that went out of practice with the Stuarts."²⁶ After canvassing various interpretations of the Clause, the Court insisted that the Eighth Amendment "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice."²⁷

¹⁹ *Trop v. Dulles*, 356 U.S. 86, 100 (1958).

²⁰ *Wilkerson v. Utah*, 99 U.S. 130, 136 (1879).

²¹ See Lain, *supra* note 16, at 664–65 (discussing historical evidence of Framers' confusion).

²² *In re Kemmler*, 136 U.S. 436, 446 (1890).

²³ 217 U.S. at 349.

²⁴ *Weems v. United States*, 217 U.S. 349, 362–64 (1910).

²⁵ *Id.* at 373.

²⁶ *Id.* at 372.

²⁷ *Id.* at 378.

Finally, the Court contrasted the challenged sentence with the lighter sentences available for more serious offenses such as treason, murder, and rebellion, concluding that *Weems*'s sentence was indeed cruel and unusual, for it "exhibit[ed] a difference between unrestrained power and that which is exercised under the spirit of constitutional limitations formed to establish justice."²⁸

With *Weems*, the Court not only broadened the scope of Eighth Amendment analysis to include considerations of proportionality; it explicitly rejected eighteenth- (and seventeenth-) century conceptions of cruelty as a basis for Eighth Amendment analysis. Thus, in addition to torturous punishments—those which were "inhuman and barbarous" in themselves²⁹—the Eighth Amendment was taken to forbid otherwise legitimate punishments deemed grossly excessive in relation to the crime.

In 1958, the Court in *Trop v. Dulles* wholeheartedly embraced this conception of the Eighth Amendment in the course of invalidating a sentence of expatriation—rendering an American-born citizen effectively stateless—for the crime of war-time desertion.³⁰ Indeed, although the analysis in *Trop* harkens back to a more traditional Eighth Amendment conception—involving a claim that the punishment was itself unusually cruel—the Court seemed to go out of its way to reiterate its commitment to a progressive reading of the prohibition. Following *Weems*, the Court affirmed that because "the words of the Amendment are not precise," their "scope is not static."³¹ Instead, the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."³² In *Trop*, this meant that while expatriation did not constitute torture in the traditional sense of physical brutality, it amounted to "a form of punishment more primitive than torture," "destroy[ing] for the individual the political existence that was centuries in the development."³³ In this way, expatriation was inconsistent with the underlying principle of the Eighth Amendment—"nothing less than the dignity of man"³⁴—as well as the consensus of civilized nations.³⁵

While *Weems* and *Trop* set the stage for modern Eighth Amendment jurisprudence, it was the plurality decision in *Gregg v. Georgia*³⁶ in 1976 that established the prevailing test for determining whether a sentence or punishment is cruel and unusual. In *Gregg*, the Court effectively reinstated the death penalty in the United States after declaring it unconstitutional only four years earlier in

²⁸ *Id.* at 381.

²⁹ *In re Kemmler*, 136 U.S. 436, 447 (1890).

³⁰ *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

³¹ *Id.* at 100–01.

³² *Id.* at 101.

³³ *Id.*

³⁴ *Id.* at 100.

³⁵ *Id.* at 102.

³⁶ 428 U.S. 153 (1976).

Furman v. Georgia.³⁷ To reach this result, the Court not only evaluated the statutory provisions that responded to the constitutional infirmities identified in *Furman*; it also invoked and strengthened its commitment to the “evolving standards of decency.” In particular, the Court insisted that the measure of evolving standards lies in an “assessment of contemporary values concerning the infliction of a challenged sanction.”³⁸ Thus, trends in legislation and patterns of jury decision making would provide the relevant “objective indicia” of contemporary public sentiment.³⁹ Finally, the Court noted its responsibility to exercise independent judgment to ensure that the punishment is consistent with “the dignity of man.”⁴⁰

Since *Gregg*, the Court has deployed essentially this formula in evaluating a range of issues, including the constitutionality of capital punishment for insane, mentally retarded, and teenage offenders, and for offenders who commit non-fatal rapes; also in assessing the permissibility of life sentences for non-violent repeat offenders and for teenagers convicted of non-homicide offenses.⁴¹ In all of these cases, the Court has relied on the evolving standards test to determine whether a sentence or punishment is cruel and unusual in violation of the Eighth Amendment. Indeed, in some cases the Court has invoked evolving standards to justify upholding a challenged punishment, only to reverse course and invalidate the same punishment under the same standard a relatively short time later.⁴² In recent years, the Court has seemed especially receptive to arguments that for certain classes of offenders, harsh punishments, such as the death penalty or life sentences without the possibility of parole, are inconsistent with evolving

³⁷ 408 U.S. 238, 239–40 (1972) (per curiam). In *Furman*, the Court invalidated the death penalty in the United States based on a determination that its infliction constituted cruel and unusual punishment because its application was arbitrary and capricious. *Id.* Although two of the justices concurring in the Court’s judgment invoked “evolving standards” as a basis for concluding that capital punishment is inherently cruel and unusual, the test did not play a decisive role in the outcome of the case. *Id.* at 269 (Brennan, J., concurring); *id.* at 242 (Douglas, J., concurring).

³⁸ *Gregg*, 428 U.S. at 173.

³⁹ *Id.*

⁴⁰ *Id.* (quoting *Trop v. Dulles*, 356 U.S. 86, 100 (1958)).

⁴¹ See *Graham v. Florida*, 130 S. Ct. 2011, 2021 (2010) (teens, non-homicide); *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2649 (2008) (non-fatal rape of child); *Roper v. Simmons*, 543 U.S. 551, 561, 578–79 (2005) (sixteen- and seventeen-year-olds); *Ewing v. California*, 538 U.S. 11, 20 (2003) (non-violent recidivists; for complicated procedural reasons, the *Ewing* Court did not explicitly invoke “evolving standards” but relied on a line of cases that did); *Atkins v. Virginia*, 536 U.S. 304, 311–12 (2002) (mentally retarded); *Ford v. Wainwright*, 477 U.S. 399, 406 (1986) (insane); *Coker v. Georgia*, 433 U.S. 584, 603 (1977) (Powell, J., concurring in the judgment in part and dissenting in part) (non-fatal rape).

⁴² Compare *Penry v. Lynaugh*, 492 U.S. 302, 335 (1989) (declining to hold that execution of mentally retarded offenders is unconstitutional), with *Atkins*, 536 U.S. at 321 (holding that capital punishment is unconstitutional for mentally retarded offenders); compare *Stanford v. Kentucky*, 492 U.S. 361, 380 (1989) (upholding death penalty for sixteen- and seventeen-year-old offenders), with *Roper*, 543 U.S. at 578–79 (deeming such sentences unconstitutional).

standards of decency. In these cases, it has emphasized national and international consensus, including the views of professional associations and interest groups, as well as the exercise of its own considered judgment.⁴³

III. "OBJECTIVE INDICIA" OF EVOLVING STANDARDS

In addition to disagreements about the substantive outcomes in these cases, critics have sought to identify flaws in the Court's method of calculating national consensus, deny the relevance of international opinion, and reject any role for the Court's "own judgment."⁴⁴ Others have focused on the incoherence of defining a constitutional right—a right of the individual against the majority—in terms of that majority's preferences.⁴⁵ After briefly reviewing the "counting" controversies, I will consider this resort to majoritarianism—the majoritarian trap—together with the case against the Court's own judgment. This analysis exposes the illegitimacy of the Court's current approach, which is based on a false choice between the "objectivity" of majoritarian criteria and the "subjectivity" of individual judgment. The result has been a set of decisions that may or may not be substantively defensible, but that reflect, in any case, the systemic failure of the constitutional process in Eighth Amendment decision making.

A. *The Deceptive Simplicity of Counting*

Among the objective indicia of society's contemporary values, determining the number of legislative enactments for and against a practice would seem to be the most straightforward. Simply count the number of states that support a penal practice and the number that do not; the result will be a percentage suggesting the degree to which the practice is consistent with contemporary values.⁴⁶ The first problem with this simple mathematical calculation is that no one can agree on the relevant data. In the death penalty context, for example, it is unclear whether the twelve states that prohibit the death penalty under all circumstances should count toward the number of states that reject the death penalty for particular offenders or

⁴³ See, e.g., *Roper*, 543 U.S. at 575–76 (noting that international opinion supported the Court's invalidation of the death penalty for minors); *Atkins*, 536 U.S. at 316 n.21 (noting the views of professional organizations that urged the Court to invalidate the use of the death penalty for mentally retarded offenders).

⁴⁴ See, e.g., *Roper*, 543 U.S. at 608–11 (Scalia, J., dissenting).

⁴⁵ See, e.g., Hurd, *supra* note 16, at 356; Lain, *supra* note 16, at 662 n.4–5 (collecting sources); see also *infra* Part III.B.

⁴⁶ The Court also typically includes federal law in calculating numerical support for a practice. In at least one case, this led to further confusion when the Court failed to take account of a military policy that might have lent needed support to a challenged—and ultimately invalidated—practice. See *Kennedy*, 128 S. Ct. at 2653 n.* (noting that the Court failed to take account of the Uniform Code of Military Justice in determining that a death sentence is disproportionate to the crime of child rape based on national consensus).

offenses. As Justice Scalia has argued, these states will not have considered the specific issues relevant to determining the applicability to particular sub-populations—to teenagers, for example.⁴⁷ “That [twelve] [s]tates favor *no* executions says something about consensus against the death penalty, but nothing . . . about consensus that offenders under [eighteen] deserve special immunity from such a penalty.”⁴⁸ On the other hand, their opposition to the use of the death penalty in all cases establishes a fortiori their opposition to its application to teenage offenders.

So who is right? The thing to see is that neither method is obviously or uncontroversially correct. Determining whether non-death penalty states should be part of the calculation would require reasoned argument about the nature of the inquiry and the scope of relevant data. Although this does not mean that there is no objective answer to the question about which states should count,⁴⁹ it does suggest that no method of decision making will allow the Court to avoid making controversial judgments or mathematically prove the validity of its conclusions.

A similar problem arises with regard to the Court’s reliance on patterns of jury decision making. In *Furman*, Justice William Brennan highlighted the relative infrequency of capital sentences and the persistent decline in its application as evidence that “society seriously questions the appropriateness of this punishment today.”⁵⁰ But as death penalty proponents have demonstrated, this same evidence might equally support the conclusion that juries are exercising their discretion responsibly, reserving the ultimate punishment for only the most appropriate cases. Thus, perhaps the “selectivity of juries in imposing the punishment of death is properly viewed as a refinement on, rather than a repudiation of, the statutory authorization for that penalty.”⁵¹ A careful parsing of the data might be able to suggest which conclusion is more defensible, but it will not uncontroversially resolve the dispute about the significance of jury decision making.

The final factor among the Court’s “objective indicia” of evolving standards—international opinion—has become the most controversial.⁵² At least since *Trop*, the Court has treated “the climate of international opinion” as “not irrelevant” to its evolving standards analysis.⁵³ “The opinion of the world community, while not controlling our outcome, does provide respected and

⁴⁷ *Roper v. Simmons*, 543 U.S. 551, 611 (2005) (Scalia, J., dissenting).

⁴⁸ *Id.*; see also *Stanford v. Kentucky*, 492 U.S. 361, 370–71 (1989) (calculating support based on exclusion of non-death penalty jurisdictions).

⁴⁹ See *infra* Part III.C.

⁵⁰ *Furman v. Georgia*, 408 U.S. 238, 299 (1972) (Brennan, J., concurring).

⁵¹ *Id.* at 388 (Burger, C.J., dissenting).

⁵² See, e.g., Youngjae Lee, *International Consensus as Persuasive Authority in the Eighth Amendment*, 156 U. PA. L. REV. 63 (2007) (discussing controversy and collecting sources).

⁵³ *Coker v. Georgia*, 433 U.S. 584, 596 n.10 (1977).

significant confirmation for our own conclusions.”⁵⁴ According to critics, however, international opinion or practice, no matter how consistent, can never inform interpretation of the *United States* Constitution.⁵⁵ On this view, it is absurd to think that the Court would assess contemporary values by looking to countries that have developed “a legal, political, and social culture quite different from our own.”⁵⁶ Moreover, critics point to the Court’s selectivity in invoking foreign sources, citing it to “affirm” judgments it has reached on other grounds but ignoring or distorting it when it departs from well-settled American values.⁵⁷ As before, the Court’s reliance on foreign sources, far from providing a neutral source of contemporary values, is likewise fraught with controversy.

B. *The Majoritarian Trap*

Beyond the various counting controversies that dog the Court’s “objective indicia” analysis, the fundamental problem with its Eighth Amendment jurisprudence is the attempt to operationalize “evolving standards” in terms of majoritarian preferences. As many commentators have noted, reliance on majority preferences to determine the scope and application of a constitutional right vitiates the protection afforded by that right.⁵⁸ For “it makes no sense to employ the value judgments of the majority as the vehicle for protecting minorities from the value judgments of the majority.”⁵⁹ This insight is easy enough to credit outside the Eighth Amendment context, where its operation is axiomatic. Thus, free speech doctrine is premised on the recognition that unpopular speakers are most in need of protection from the inclination of the majority to silence them, because “if there is any principle of the Constitution that more imperatively calls for attachment than

⁵⁴ *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

⁵⁵ See, e.g., *Thompson v. Oklahoma*, 487 U.S. 815, 868 n.4 (1988) (Scalia, J., dissenting) (“The plurality’s reliance upon Amnesty International’s account of what it pronounces to be civilized standards of decency in other countries is totally inappropriate as a means of establishing the fundamental beliefs of this Nation.”) (citation omitted).

⁵⁶ *Roper*, 543 U.S. at 627 (Scalia, J., dissenting).

⁵⁷ *Id.* at 627 & n.9, 628.

⁵⁸ See, e.g., Hurd, *supra* note 16, at 356 (“After all, if rights are at stake, why would it matter how many people might want to trample them?”); Michael S. Moore, *Morality in Eighth Amendment Jurisprudence*, 31 HARV. J.L. & PUB. POL’Y 47, 63 (2008) (“It does not make sense to give a majoritarian interpretation of minority rights against the majority.”); Margaret Jane Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause*, 126 U. PA. L. REV. 989, 1036 (1978) (“Constitutional doctrine may not be formulated by the acts of those institutions which the Constitution is supposed to limit.”); Stinneford, *supra* note 13, at 1754 (“Because the evolving standards of decency test ties the meaning of the Cruel and Unusual Punishments Clause to public opinion, the Eighth Amendment provides little protection when public opinion becomes enflamed and more prone to cruelty.”).

⁵⁹ JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 69 (1980).

any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate.”⁶⁰

Consider, for example, a group of neo-Nazis proposing to stage a march to promote their racial agenda, which a large majority of the community regards as odious and offensive. They apply for a parade permit but are denied by local officials who hope to prevent the march. If the Court determined to resolve the matter of the marchers’ rights by canvassing the permitting practices of officials in similar cases, it might well discover that unpopular marchers are routinely denied permits based on the offensiveness of their message. Were the Court to conclude that the First Amendment protection therefore extends only to those popular enough to gain a permit in the first place, it would render the right to free expression effectively meaningless. However, it is well established that denying the parade permit based on the unpopularity of the marchers or their message is inconsistent with respect for their First Amendment rights.⁶¹

In the Eighth Amendment context, it is similarly objectionable to invoke majority opinion—as reflected in legislation, jury verdicts, or international opinion⁶²—as a basis for determining the scope and content of the constitutional right against cruel treatment. For obvious reasons, criminal offenders are among the most despised members of any community. Moreover, as a general matter, they lack the political power and influence to advance their legitimate interest in decent treatment through ordinary political processes.⁶³ The prohibition on cruel treatment, like other Bill of Rights protections, is designed to safeguard the rights of such powerless and unpopular minorities who might otherwise be left to the mercy of a hostile majority.⁶⁴ But an Eighth Amendment doctrine that links the standard of cruelty to prevailing public attitudes provides the least protection from cruel treatment to those who need it most.

In view of recent decisions that have favored offenders challenging harsh sentences, the danger of defining rights protection with reference to public attitudes may seem somewhat remote. Guided by “objective indicia,” the Court has managed to safeguard the rights of even those guilty of the most terrible

⁶⁰ *United States v. Schwimmer*, 279 U.S. 644, 654–55 (1929) (Holmes, J., dissenting).

⁶¹ *See, e.g., Nat’l Socialist Party v. Skokie*, 432 U.S. 43, 44 (1977) (per curiam).

⁶² The weight of international opinion has actually tended to favor criminal offenders in the Court’s Eighth Amendment analysis. *See, e.g., Roper v. Simmons*, 543 U.S. 551, 575–78 (2005); *Atkins v. Virginia*, 536 U.S. 304, 325 (2002) (Rehnquist, C.J., dissenting); *Trop v. Dulles*, 356 U.S. 86, 102–03 (1958). Of course this historical contingency does not render valid the Court’s practice of gauging popular opinion, international or otherwise, to determine whether a punishment is unconstitutionally cruel.

⁶³ *See* TONRY, *supra* note 8, at 15.

⁶⁴ *See* *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) (“The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.”).

crimes.⁶⁵ And if, as these developments suggest, majoritarian considerations are consistent with a robust commitment to individual rights, then perhaps we should not be so quick to reject the Court's analysis. If anything, in a democratic society, we should be suspicious of standards that defy the popular will.⁶⁶

Apart from the conceptual problem already identified, we should resist this overly sanguine account of recent Eighth Amendment jurisprudence. First, the right of criminal offenders to decent treatment is insecure to the extent that it depends on prevailing public sentiment. In the death penalty context, for example, Justice Thurgood Marshall's effort to reconcile majoritarian considerations with the Court's independent duty to evaluate the practice illustrates the perils of linking constitutional standards to public attitudes, no matter how ideally conceived.⁶⁷ In *Furman*, Marshall maintained that, despite popular support for the death penalty, the relevant "question . . . is not whether a substantial proportion of American citizens would today, if polled, opine that capital punishment is barbarously cruel, but whether they would find it to be so in the light of all information presently available."⁶⁸ According to Marshall, were the public to learn certain facts about the death penalty—the imbalance between its high social costs and low social benefits together with the discriminatory and disruptive manner in which it is applied—they would promptly turn against it.⁶⁹ But, as Marshall was forced to concede a short time later, greater exposure to the facts about capital punishment coincided with renewed and enthusiastic public support for it.⁷⁰ In the wake of *Furman*, thirty-five states and the federal government enacted new death penalty statutes; in California, voters overwhelmingly adopted a constitutional amendment restoring the death penalty after it had been invalidated by the California Supreme Court.⁷¹ As Justice O'Connor observed in a subsequent case, "any inference of a societal consensus rejecting the death penalty [in 1972] would have been mistaken."⁷²

⁶⁵ See, e.g., *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2646 (2008) (recounting Kennedy's brutal rape of his eight-year-old stepdaughter); *Roper*, 543 U.S. at 556–57 (describing Roper's role in the brutal and senseless murder of a woman); *Atkins*, 536 U.S. at 338 (Scalia, J., dissenting) (noting that Atkins abducted, robbed, and murdered his victim, shooting him eight times).

⁶⁶ See generally Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006) (arguing that judicial review of legislation is democratically illegitimate and, as a general matter, unnecessary for safeguarding individual rights).

⁶⁷ See *Furman v. Georgia*, 408 U.S. 238, 362 (1972) (Marshall, J., concurring).

⁶⁸ *Id.*

⁶⁹ *Id.* at 362–63.

⁷⁰ See *Gregg v. Georgia*, 428 U.S. 153, 232 (1976) (Marshall, J., dissenting) ("I would be less than candid if I did not acknowledge that these developments [i.e., post-*Furman* legislative support for the death penalty] have a significant bearing on a realistic assessment of the moral acceptability of the death penalty to the American people.").

⁷¹ See *id.* at 181.

⁷² *Thompson v. Oklahoma*, 487 U.S. 815, 855 (1988) (O'Connor, J., concurring).

A second problem with relying on recent offender-friendly decisions to vindicate the Court's majoritarian approach is that the decisions themselves display a degree of incoherence—between outcomes and their stated rationales—that seriously undermines their viability. In *Kennedy*, for example, the recent decision invalidating the death penalty for the non-fatal rape of a child, the Court invokes both of the leading justifications for capital punishment—deterrence and retribution—but seems unaware of the obvious tension between them.⁷³ Meanwhile, it considers both the objective indicia analysis as well as its own judgment, but never suggests whether or how the two are related or which takes precedence in case of a conflict. Under these circumstances, it is impossible to discern which values or considerations are doing the actual decision-making work.⁷⁴ In any case, the Court's failure to offer a satisfactory resolution of the various counting controversies casts doubt on the claim of objectivity that purports to legitimate its assessment of evolving standards.

In the face of these discrepancies, the Court has acknowledged the importance of its "own judgment," but its efforts to articulate it have been unconvincing. Indeed, because the Court has made so much of the distinction between its own judgment and the *objective* indicia of contemporary standards, it has significantly diminished its own credibility. In this way, the Court has left itself vulnerable to the charge that when it exercises independent judgment it is substituting its subjective policy preferences for objective constitutional analysis. In fact, because neither the objective indicia nor its "own judgment" provide meaningful decision-making guidance, the Court is adrift, generating seemingly ad hoc rationalizations for outcomes reached, as far as anyone can tell, on the basis of its own political agenda.

The Court has thus fallen into a trap of its own making, clinging to majoritarian considerations that ostensibly provide objective standards in order to minimize—or mask—reliance on its own subjective judgment. The result is an Eighth Amendment jurisprudence that lacks political legitimacy—not because it incorporates the Court's own judgment, but because it fails to specify the actual grounds of decision or provide a meaningful opportunity for critical evaluation of its reasoning.⁷⁵

⁷³ See *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2661 (2008) (noting "the two distinct social purposes served by the death penalty: retribution and deterrence").

⁷⁴ Hurd, *supra* note 16, at 357 (noting that the Court "embarks upon a disjointed and meandering discussion of a laundry list of considerations, not all of which are compatible, many of which are ill-conceived, and few of which appear appropriate to deciding whether death is a constitutional response to child rape").

⁷⁵ See JOHN RAWLS, *POLITICAL LIBERALISM* 237 (1993) (noting the Supreme Court's role as an "exemplar of public reason," which requires that it render and explain its decisions in terms of public values).

C. Moral Skepticism

Why has the Court become ensnared in this majoritarian trap? Several familiar features of constitutional analysis have played a role, leading the Court to adopt a form of moral skepticism that all but denies the possibility of objective judgment in the face of moral controversy. First, it is well established that the prohibition on cruel and unusual punishment, more obviously than most constitutional guarantees, reflects an abstract moral principle.⁷⁶ Once the Court rejected a strict originalist account of the prohibition, it committed itself to the proposition that the “standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment.”⁷⁷ Whereas an originalist interpretation would have limited application of the Amendment to forms of punishment recognized as cruel and unusual by eighteenth-century standards, an independent moral judgment necessarily involves a broader range of considerations.⁷⁸

The prospect of rendering such a judgment triggers the Court’s sensitivity about the nature and scope of its own role within a liberal-democratic polity. For “in a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people.”⁷⁹ In the Eighth Amendment context in particular, “the primacy of the legislative role narrowly confines the scope of judicial inquiry.”⁸⁰ The alternative—defining the Amendment not “on the basis of what [the Court] perceive[s] the society through its democratic processes now overwhelmingly disapproves,” but according to the Court’s own judgment—amounts to replacing “judges of the law with a committee of philosopher-kings.”⁸¹

To avoid this form of democratic illegitimacy, the Court has consistently cast the evolving standards analysis in terms of the objective indicia that keep their personal policy preferences at bay. “Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual [j]ustices; judgment should be informed by objective factors to the maximum possible extent.”⁸² Indeed, despite disagreements among the justices about the role, if any, for the Court’s “own judgment,” evolving standards analysis invariably focuses first on legislation as the “clearest and most reliable objective evidence of contemporary values,”⁸³ and only later, if at all, on its own judgment. In this way, the Court seeks to deflect the charge that its Eighth Amendment decisions are merely “*post*

⁷⁶ ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 145 (1997).

⁷⁷ *Furman v. Georgia*, 408 U.S. 238, 382 (1972) (Burger, C.J., dissenting).

⁷⁸ SCALIA, *supra* note 76, at 145 (arguing that the meaning of the Eighth Amendment is rooted in the eighteenth century).

⁷⁹ *Furman*, 408 U.S. at 383 (Burger, C.J., dissenting).

⁸⁰ *Id.* at 384.

⁸¹ *Stanford v. Kentucky*, 492 U.S. 361, 379 (1989) (plurality opinion).

⁸² *Coker v. Georgia*, 433 U.S. 584, 592 (1977).

⁸³ *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989).

hoc rationalization[s] for the [Court's] subjectively preferred result rather than any objective effort to ascertain the content of an evolving standard of decency."⁸⁴ Having framed Eighth Amendment analysis as a choice between objective considerations that flow from democratic processes and the subjective preferences of the unelected, unaccountable judiciary, the Court has left itself no meaningful choice at all.

This unfortunate development in Eighth Amendment interpretation reflects a more pervasive confusion about the nature of objectivity, its place in moral analysis, and the operation of both in constitutional interpretation. Against a backdrop of suspicion about the democratic legitimacy of an unelected judiciary, the Court has developed a variety of mechanisms of deference and restraint designed to circumscribe its role.⁸⁵ In this spirit, it has embraced a crude form of skepticism in Eighth Amendment interpretation predicated on the denial of an objective morality. On this view, because moral truth does not exist or is, in any case, unknowable, the enterprise of moral analysis is inherently futile. Further, because moral values merely reflect the subjective preferences of those who hold them, they cannot be proved (or disproved) or otherwise objectively justified. Accordingly, it is illegitimate for the Court to invalidate legislative enactments based on a judgment of moral error because there are no objective grounds to prefer one moral claim to another. In a democratic society, then, the Court is bound to defer to the will of the people about what counts as cruelty in punishment lest it arrogate to itself the role of philosopher-kings.

Among the many problems with this skeptical account of Eighth Amendment interpretation, perhaps the most glaring is its lack of fit with the broader constitutional enterprise. In particular, skepticism is incompatible with the robust commitment to natural rights that animated the Framers and their conception of the judicial role. From the familiar reference to "unalienable rights" in the Declaration of Independence to the specific guarantees in the Constitution and the Bill of Rights, the Framers conceived of morality as an objective reality that predates—and transcends—the institution of political society.⁸⁶ A judiciary empowered to police the boundaries between the limited power of government and the natural rights of individuals follows "from the nature and reason" of the constitutional design.⁸⁷

⁸⁴ *Atkins v. Virginia*, 536 U.S. 304, 322 (2002) (Rehnquist, C.J., dissenting).

⁸⁵ See, e.g., ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962) (outlining and defending various devices by which the Court has sought to retain its status as the least dangerous branch).

⁸⁶ See generally MORTON WHITE, *PHILOSOPHY, THE FEDERALIST, AND THE CONSTITUTION* (1987) (tracing the Lockean natural law origins of the Framers' normative moral philosophy and epistemology); see also Moore, *supra* note 58, at 55 ("[I]f one is a moral realist—as Madison, Hamilton, and Locke were—it follows that when judges are enjoined to make moral judgments, they judge something that is not of their own creation.") (footnote omitted).

⁸⁷ *THE FEDERALIST* NO. 78, at 230 (Alexander Hamilton) (Roy P. Fairfield ed., 1961) (distinguishing between positive legislative enactments and rules of constitutional construction that

In a modern pluralist society, however, the skeptical impulse springs primarily from the fact of pervasive moral disagreement. Competing conceptions of justice and the good (for example) fuel the suspicion that moral truth is simply unavailable. If otherwise reasonable people cannot agree about what justice requires or the good life entails, then we may be tempted to deny the possibility of an objective account of the just and the good. In this way, moral inquiry compares unfavorably with scientific inquiry, with its vaunted method for ascertaining and verifying scientific facts. For if the measure of truth is replicability—generating consistent results by systematically following standard procedures—then the persistence of moral diversity stands as a testament to the futility of moral inquiry: no consistency, no truth.

Despite its superficial plausibility, this analysis suffers from at least two serious flaws. First, the fact of disagreement itself does not establish the absence of a moral truth-of-the-matter. No matter how tempting it is to see disagreements about abortion rights, wealth redistribution, or affirmative action as evidence of moral indeterminacy, the fact of disagreement cannot, by itself, demonstrate that skepticism is warranted.⁸⁸ “Whether diversity of opinion in some intellectual domain has skeptical implications depends on a further philosophical question: it has such implications only if the best account of the content of that domain explains why it should.”⁸⁹ In the absence of an argument establishing a causal relationship between moral truth and moral opinions, the persistence of moral disagreement does not justify the skeptical conclusion.

The familiar comparison with scientific inquiry, typically adduced to discredit moral inquiry, is instructive in this respect but also has the potential to mislead. For in the realm of science, we tend to overestimate the degree of consensus, taking scientific agreement as conclusive evidence of scientific truth. But in fact, our perception of scientific consensus is almost certainly exaggerated; most of us, with regard to most scientific fields, simply lack the expertise to appreciate the nature and extent of scientific controversy.⁹⁰ In any case, when we do encounter

derive “from the nature and reason of the thing”); see also *Marbury v. Madison*, 5 U.S. 137, 178 (1803) (noting that courts’ determination as to whether legislative enactments are consistent with the Constitution “is the very essence of judicial duty”).

⁸⁸ David Copp, *Moral Skepticism*, 62 PHIL. STUD. 203, 203 (1991) (“[I]t is entirely clear that there is no sound argument from disagreement alone to any interesting form of skepticism.”); Ronald Dworkin, *Objectivity and Truth: You’d Better Believe It*, 25 PHIL. & PUB. AFF. 87, 113 (1996) (“[W]e would not count the popularity of our moral opinions as evidence for their truth. Why should we count their controversiality as evidence against it?”).

⁸⁹ Dworkin, *supra* note 88, at 113. Dworkin illustrates with an example, observing that we might be justifiably skeptical if millions of people who claimed to have seen unicorns described vastly different creatures. For “if there were unicorns, and people had seen them, the actual properties of the beast would have caused more uniform reports. But when we have no such domain-specific account of why diversity of opinion impeaches all opinion, we draw no skeptical conclusions from that diversity.” *Id.*

⁹⁰ See JAMES RACHELS & STUART RACHELS, *THE ELEMENTS OF MORAL PHILOSOPHY* 47 (5th ed. 2007) (noting that complicated scientific questions generate considerable disagreement among

disagreements in science—about evolution, for example, or astrophysics—it generally does not cause us to deny that there is a fact of the matter about the origins of life or of the universe. Instead, we yield to the stronger theory, the one that better explains the phenomenon in question and accords with other well-settled beliefs about which we are most confident. That others hold fast to the contrary view—to creationism, for example—affects neither the truth of human origins nor our confidence in the scientific method.⁹¹ Those who remain unpersuaded by even the most compelling scientific theories may be stubborn or ideological or moved by faith, but the fact of disagreement does not alter the fact of the matter.⁹²

Another area of confusion in the Court's skeptical account is the assumption that objectivity requires quantifiable or otherwise uncontroversial metrics. In the Eighth Amendment context, this has led the Court to focus on certain sorts of variables—the number of states, the frequency of jury verdicts, the weight of international opinion—that can, in principle, be readily measured or counted.⁹³ By the same token, the Court has discounted as necessarily “subjective” a range of morally relevant considerations that are not susceptible of being quantified. Thus,

scientists); Daniel McDermott, *Analytical Political Philosophy*, in *POLITICAL THEORY: METHODS AND APPROACHES* 11, 24 (David Leopold & Marc Stears eds., 2008).

From the outside it may seem like scientists form a harmonious community, with individual scientists unveiling new theories to the happy applause of their colleagues, when the truth is that scientists often disagree profoundly about methods and results, leading to disputes as bitter as any [you will] find in a humanities department.

Id.

⁹¹ See McDermott, *supra* note 90, at 21 (“I certainly wouldn’t infer from the fact of our disagreement that there is no truth of the matter about human origins, just differing opinions. Nor would I allow this disagreement to undermine my confidence in scientific methods and tests.”)

We can certainly imagine fields of scientific inquiry in which specialists are divided over the best interpretation of the relevant data. In the face of such a live controversy, uncertainty may be warranted. But uncertainty is distinct from indeterminacy. See Dworkin, *supra* note 88, at 130–31. According to Dworkin, “[i]f I see arguments on all sides of some issue, and do not find, even after reflection, one set of arguments stronger than the others, then I am entitled without more to declare that I am uncertain.” *Id.* at 131. By contrast, a “belief in indeterminacy is a positive claim, and it needs a positive reason or assumption to support it.” *Id.* Thus, indeterminacy—the affirmative view that there is no answer to some moral question—cannot simply be true by default.

⁹² The comparison to the domain of science is misleading in another respect. In the context of moral inquiry, we tend to focus on the most contentious issues—abortion, capital punishment, gay rights. In science, lay people tend to be unaware of the numerous controversies and ill-equipped to appreciate them in any case. See RACHELS & RACHELS, *supra* note 90, at 47. This is not to suggest that science and morality are on equal footing, however. It remains the case that we can generally be more confident about scientific theory than moral theory. As McDermott observes, the interplay between human beings and their environment is such that our empirical judgments tend to be more reliable than our normative judgments, resulting in greater convergence around scientific truths. McDermott, *supra* note 90, at 23.

⁹³ As the counting controversies suggest, even these “objective” criteria are subject to considerable disagreement about the nature and significance of the relevant data. See *supra* Part III.A.

the Court has generally declined to render judgments about the precise nature of moral concepts such as cruelty, decency, or dignity, or the manner and extent of punishment they justify.

It is easy enough to see how the Court came to hold such a mistaken view. In a variety of settings, we associate objectivity with decision making that does not require individual judgment or discretion. Perhaps the most obvious example is the machine-graded, multiple-choice exam, denominated “objective” and contrasted with the essay exam, the “subjective” alternative. Although these labels provide a useful shorthand for a familiar distinction, they perpetuate the confusion about the nature of objectivity. Essay tests, to have any legitimacy, must also be objective tests. As anyone who has graded (if not also those who have been graded) can attest, evaluating an essay exam does not involve—or countenance—subjective judgment. Thus, assigning grades based on such considerations as one’s mood, or preference for particular students, or aversion to certain font styles is obviously illegitimate. For although grading essays requires the exercise of judgment—about the student’s mastery of material and the clarity and cogency of argumentation, for example—conscientious grading requires the application of consistent qualitative standards of substance and style. An experienced grader may be able to operate without a formal list of such standards, but any conscientious grader would be able to produce and defend such a list if necessary.

While the tendency to overvalue quantitative standards should not mislead us into thinking that discretionary judgments are necessarily subjective, neither should we deny the distinctive potential for abuse associated with such judgments. Thus, while it would be obviously improper to grade an exam based on a student’s physical appearance, the opportunity for such an impropriety only meaningfully arises in the context of discretionary decision making. Whereas a grading machine can only take account of the programmed criteria based on the placement of standard markings, a grading human may rely on an indeterminate mix of permissible and impermissible criteria, whose influence he may not be able fully to recognize or control. The potential for such abuse helps to explain the Court’s inclination to deemphasize its “own judgment” in Eighth Amendment analysis.

The problem with the Court’s reticence in this context is that it effectively disables itself from performing its constitutionally assigned role.⁹⁴ As a matter of constitutional design and institutional competence, the judiciary’s singular strength is the power of judgment.⁹⁵ Insulated from the ordinary forces of electoral politics, judges are meant to have and exercise independence sufficient “to guard the Constitution and the rights of individuals,” especially the rights of minorities against majority oppression.⁹⁶ To the extent that the judiciary refuses to exercise

⁹⁴ See THE FEDERALIST NO. 78, *supra* note 87, at 228 (Alexander Hamilton).

⁹⁵ See *id.* (noting that the judiciary is insulated from the majoritarian forces that dominate electoral politics and exercises only the power of judgment).

⁹⁶ *Id.* at 231.

its independence in assessing the constitutionality of legislative enactments, it fails to serve as a check on majoritarian impulses. In the Eighth Amendment context, which most directly concerns the rights of unpopular individuals, the Court's refusal is especially troubling. By downplaying the significance of its own judgment, and rendering decisions in terms of the quantifiable metrics of contemporary values, the Court has mistaken acquiescence for humility. By contriving to avail itself of the majoritarian legitimacy of representative institutions, it has neglected its distinctive constitutional role to render independent judgment. Finally, by issuing opinions that fail adequately to justify the decisions it reaches, it has undermined its own political legitimacy.

IV. REVIVING "EVOLVING STANDARDS"

Given that the evolving standards test has led the Court astray, generating an incoherent and illegitimate Eighth Amendment jurisprudence, perhaps it should now be abandoned. Indeed, despite the many issues that divide critics of the Court's doctrine, the one point of agreement seems to be shared contempt for the evolving standards test.⁹⁷ Under these circumstances, why not jettison "evolving standards" in favor of a new approach unburdened by so much philosophical confusion?

Apart from the familiar difficulties associated with the wholesale rejection of well-established precedent, the "evolving standards of decency" formulation is worth preserving because it highlights important moral and political values that belong at the center of Eighth Amendment analysis. The fundamental idea, first articulated in *Weems* and *Trop*, is that mature civilizations eschew gratuitous brutality because it is inconsistent with respect for human dignity.⁹⁸ In this way, evolving standards captures the values instantiated in the Eighth Amendment, requiring the Court to develop and defend a contemporary account of decent treatment that keeps faith with the progressive spirit of the constitutional enterprise.

With this in mind, we are now in a position to consider an alternative to the crude majoritarianism of the Court's "objective" analysis and the illegitimacy of the subjective-preferences approach. The way forward lies in an analysis of Eighth

This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men or the influence of particular conjunctures sometimes disseminate among the people themselves; and which, though they speedily give place to better information and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.

Id.

⁹⁷ See, e.g., SCALIA, *supra* note 76, at 46–47; Hurd, *supra* note 16, at 352–53; Lain, *supra* note 16, at 661–62; Moore, *supra* note 58, at 58; Stinneford, *supra* note 13, at 1755–56.

⁹⁸ See *Trop v. Dulles*, 356 U.S. 86, 101 (1958); *Weems v. United States*, 217 U.S. 349, 381 (1910).

Amendment concepts—dignity, cruelty, and decency—in terms of our political morality. To that end, I begin by developing a general account of the familiar values and commitments that constitute our political morality, highlighting both substantive and procedural features that reflect the distinctive principles of liberal democracy. I then sketch the political morality of the Eighth Amendment—the interplay between these broader commitments and the specific values embodied in the prohibition on cruel and unusual punishment. Although the resulting framework will not by itself resolve the various controversies concerning our punitive institutions and practices, it should direct our attention to the relevant considerations.

A. Political Morality

“Political morality” refers to the “set of distinct political principles [that apply] specifically to the use of [state] power.”⁹⁹ It embodies the moral convictions and commitments that, when all goes well, govern decisions of law and policy in the public sphere. In this sense, political morality is the collective analog of personal morality—the system of values meant to shape and constrain our treatment and expectations of others. Like personal morality, political morality is inherently controversial. Although it is embodied in our traditions, institutions, and authoritative political documents, we regularly confront conflicting interpretations of its meaning and implications.

By way of illustration, consider the value of equality. Explicitly enshrined in (at least) the Declaration of Independence and the Fourteenth Amendment, equality is doubtless a basic principle of our political morality. But beyond that observation, almost everything about equality is controversial. Does it require or forbid wealth redistribution? Does it apply only to treatment at the hands of government or to relations among private citizens as well? Does it permit affirmative action as a race-conscious remedy or forbid it in favor of a colorblind ideal? What about segregation or gay marriage? In addressing these controversies, we will get little help from the dictionary or other accounts that purport to supply a singular definition. Instead, we will have to grapple with competing interpretations of equality to identify the one that best accords with our other commitments and values.¹⁰⁰

It might be objected that this complicated interpretive approach would be unnecessary if we simply insisted that judges and others interpret and apply constitutional provisions according to a neutral approach, such as originalism or

⁹⁹ RICHARD VERNON, *POLITICAL MORALITY: A THEORY OF LIBERAL DEMOCRACY* 35 (2001).

¹⁰⁰ For good discussions of this process of reconciliation, see JOHN RAWLS, *A THEORY OF JUSTICE* 18–19 (rev. ed. 1999) (describing the process of reflective equilibrium); Norman Daniels, *Wide Reflective Equilibrium and Theory Acceptance in Ethics*, 76 J. PHILOSOPHY 256 (1979); Joel Feinberg, *Justice, Fairness and Rationality*, 81 YALE L.J. 1004 (1972). For an attempt to apply these insights to the justification of punishment, see Mary Sigler, *The Methodology of Desert*, 42 ARIZ. ST. L.J. 1173 (2011).

plain meaning. It is important to see that any claim along these lines is itself an exercise in interpretive political morality, offering a rival account of constitutional meaning with reference to a distinct set (or hierarchy) of political values. As a result, these alternatives do not displace the enterprise of interpretive political morality; they join the fray as competitors. Moreover, none can claim the mantle of neutrality, for each reflects a competing arrangement of political values—about the relative importance of majoritarianism, the role of the judiciary, and the nature of limited government, for example—that must be articulated and defended as an aspect of political morality.¹⁰¹

In the face of this daunting challenge, perhaps the Court can be forgiven for defaulting to majoritarian considerations, which undoubtedly occupy an important place in our political morality. In a variety of settings, including Supreme Court decision making, “majority rules” is a venerable decision procedure that “instantiates one straightforward understanding of the principle of political equality: equal votes for equal people and the greatest number wins.”¹⁰² As already suggested, however, to rely on majoritarianism as a proxy for constitutional meaning is to succumb to the dark forces of moral skepticism, rejecting the possibility of objective moral judgment and repudiating key aspects of our political morality.¹⁰³

Despite persistent controversy about the meaning and application of our political morality, a number of basic values are reasonably well settled. The starting point is the familiar set of liberal-democratic premises that inform our legal and political institutions and practices.¹⁰⁴ On this account, individuals are naturally free and equal and endowed with rationality and a bundle of inalienable rights. As such, legitimate state power is exercised on the basis of consent to secure individual rights and liberties through the mechanisms of self-government and the rule of law. The commitment to self-government ensures people a say in establishing and enforcing the laws that bind them, while the rule of law constrains

¹⁰¹ See DWORKIN, *supra* note 17, at 6–11, 31–43.

¹⁰² Stephen Macedo, *Against Majoritarianism: Democratic Values and Institutional Design*, 90 B.U. L. REV. 1029, 1032 (2010); see also Jeremy Waldron, *A Majority in the Lifeboat*, 90 B.U. L. REV. 1043, 1055 (2010) (“Now it is well-known, as a matter of decision-theory, that the principle of majority-decision and only the principle of majority-decision satisfies” the requirements of equality and fairness.).

¹⁰³ See discussion *supra* Part III.B. The Framers did not conceive of morality in conventional terms, nor, as a general matter, has the judiciary. See, e.g., WHITE, *supra* note 86, at 216.

For [the Founders], the proposition that all men had a *right* to life, liberty, religious freedom, and even the pursuit of happiness could be discovered by Locke’s rationalistic method of discovering the laws of nature, whereas the proposition that some course of action was in the interest of the whole community could only be discovered by experience or experiment.

Id. See also Moore, *supra* note 58, at 52.

¹⁰⁴ This basic outline of liberal values is drawn from Locke’s influential defense. See generally JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 269–78, 347–53 (Peter Laslett ed., Cambridge Univ. Press 1988) (1960).

arbitrary and unreasonable manifestations of collective power. Further, because individuals are possessed of equal moral worth, a status inherent in their humanity, their interests must be taken account of in collective decision making. "Respect for persons is one of the basic tenets of liberal[-]democratic societies, which are founded on the ideal of the equal dignity of all citizens and which realize this ideal in the equalization of rights and entitlements among all citizens."¹⁰⁵

Attention to the principles that underlie public decisions is also essential to democratic legitimacy. For in a liberal-democratic society, the "exercise of political power is proper and hence justifiable only when it is exercised in accordance with a constitution the essentials of which all citizens may reasonably be expected to endorse in the light of principles and ideals acceptable to them as reasonable and rational."¹⁰⁶ Thus, the power of judicial review imposes on courts a special obligation "to explain and justify their decisions as based on their understanding of the constitution and relevant statutes and precedents."¹⁰⁷ When judges act without publicly accessible reasons, their conduct is, to that extent, illegitimate.¹⁰⁸

B. Political Morality of the Eighth Amendment

In the context of the Eighth Amendment, the values highlighted by the "evolving standards of decency" formulation both reflect and focus our political morality. At the core of the prohibition against cruel and unusual punishment lies the recognition of human dignity as a normative status that does not depend on individual achievement or character but attaches to our humanity as such.¹⁰⁹ Indeed, "the idea of respect to humans is most needed when they are not innocent" or otherwise apparently deserving of concern and respect.¹¹⁰ For "the fundamental premise of the Clause [is] that even the vilest criminal remains a human being possessed of common human dignity."¹¹¹ In this way, the rejection of cruelty and the commitment to decency point to a progressive standard that ensures "respect for [criminals'] intrinsic worth as human beings."¹¹²

Of course, the textual focus of the Eighth Amendment is the prohibition on cruel and unusual punishment. Cruelty consists of "the willful inflicting of

¹⁰⁵ Robin S. Dillon, *Respect*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, 25 (last modified Jun. 21, 2010), <http://plato.stanford.edu/entries/respect/>.

¹⁰⁶ RAWLS, *supra* note 75, at 217.

¹⁰⁷ *Id.* at 216.

¹⁰⁸ RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 248–53 (1977).

¹⁰⁹ *Trop v. Dulles*, 356 U.S. 86, 100 (1958) ("The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.").

¹¹⁰ Avishai Margalit, *Human Dignity Between Kitsch and Deification*, 4, http://www.filosoficas.unam.mx/act_acad/simposio/AMargalit.pdf (last visited Jan. 16, 2011).

¹¹¹ *Furman v. Georgia*, 408 U.S. 238, 273 (1972) (Brennan, J., concurring).

¹¹² *Id.* at 270.

physical pain on a weaker being in order to cause anguish and fear.”¹¹³ It involves indifference to, or positive pleasure in, the infliction of suffering on another. In the context of punishment, the infliction of suffering is at least part of the legitimate point, but the gratuitous infliction of suffering—beyond what is necessary or deserved—distinguishes the realm of cruelty. The prohibition on cruelty in punishment thus applies not only to treatment that is inherently barbaric, but also to sentences that are disproportionate to the crime.¹¹⁴ Punishment that is cruel in either sense reflects an abuse of collective power and is inconsistent with the respect for human dignity that the liberal-democratic state presupposes.

As an interpretation of the prohibition on cruelty, the evolving standards test is formulated in terms of a positive commitment to the standards of decency that distinguish a civilized society.¹¹⁵ Decency is an aretaic concept that falls somewhere on the scale of excellence between virtuousness and viciousness.¹¹⁶ Although it conveys a generally positive moral judgment, it does not set an especially demanding standard; when met, it merits only minimal praise.¹¹⁷ A state’s commitment to decency involves consideration for the basic human needs of individuals—those necessities they require “just by virtue of being human.”¹¹⁸ In addition to the physical aspects of individual well-being, such as personal health and safety, the commitment to decency includes a psychological dimension as well. Thus, as a general matter, it is indecent to subject individuals to humiliation or other threats to their self-respect.¹¹⁹

In the domain of punishment, however, some degree of physical discomfort and social dishonor is a deliberate feature of criminal sanctions. Indeed, “[t]o the extent that such conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society.”¹²⁰ Moreover, punishment is inherently stigmatizing, conveying society’s moral condemnation of an offender’s criminal conduct.¹²¹ But while punishment is

¹¹³ Judith N. Shklar, *Putting Cruelty First*, DAEDALUS, Summer 1982, at 17.

¹¹⁴ See *Weems v. United States*, 217 U.S. 349, 368 (1910).

¹¹⁵ See *Trop v. Dulles*, 356 U.S. 86, 100 (1958).

¹¹⁶ Johan Brännmark, *From Virtue to Decency*, 37 METAPHILOSOPHY 589, 595 (2006).

¹¹⁷ Mathias Risse, *The Morally Decent Person*, 38 S.J. PHILOSOPHY 263, 266 (2000).

¹¹⁸ Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 921 (2009).

¹¹⁹ AVISHAI MARGALIT, *THE DECENT SOCIETY*, at 1 (Naomi Goldblum trans., 1996). The extremely torturous punishments of the premodern period involved not only physical brutality but humiliation as well. See *id.* at 263.

¹²⁰ *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981).

¹²¹ R.A. DUFF, *PUNISHMENT, COMMUNICATION, AND COMMUNITY*, at xv (2001); Joel Feinberg, *The Expressive Function of Punishment*, 49 MONIST 397, 401 (1965); MARGALIT, *supra* note 119, at 269; Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 599 (1996). One need not believe that the purpose of punishment is expressive to accept that conviction and punishment for a criminal offense expresses moral condemnation. See ANDREW VON HIRSCH, *CENSURE AND SANCTIONS* 9 (1993).

necessarily unpleasant and dishonorable in these ways, the commitment to decency requires that it “must be kept entirely free of any maltreatment that would make an abomination of the humanity residing in the person suffering it.”¹²² The commitment to decency is thus inconsistent with gratuitously harsh or excessive punishments or conditions that fail to meet offenders’ basic human needs.¹²³ For “[a] decent society cares about the dignity of its prisoners.”¹²⁴

The final dimension of evolving standards concerns the progressive spirit of the Eighth Amendment protection. According to the *Trop* Court’s formulation, the controlling standards of decency are those that “mark the progress of a maturing society.”¹²⁵ The point is not only that mature civilizations have become progressively less violent, though they certainly have;¹²⁶ rather, it is that these developments are at least partly what maturity consists in. That is, evolving standards, properly understood, involves a normative, not an empirical, inquiry; it does not depend on prevailing public sentiment or trends in state practice. It is for this reason that we need not be overly troubled by the possibility that “evolving standards” might eventually lead us back to the gruesome forms of medieval punishment the Framers specifically had in mind when they adopted the Eighth Amendment.¹²⁷ Although such a development is not impossible, it is quite unlikely, for it would have to be reconciled with the rejection of cruelty and the commitment to decency as these have come to be understood. So while we cannot rule out the possibility that the Court will one day sanction the rack and the breaking wheel in the name of “evolving standards,” it seems about as likely as the possibility that in the domain of human origins we will come to reject evolutionary theory in favor of creationism. Knowing what we now know, it is practically inconceivable.¹²⁸

¹²² IMMANUEL KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* § 333, at 102 (John Ladd trans., Bobbs-Merrill Co. 1965) (1797).

¹²³ See, e.g., *Farmer v. Brennan*, 511 U.S. 825, 847 (1994) (disapproving of “denying humane conditions of confinement” under the Eighth Amendment if there is “substantial risk of serious harm” which is disregarded); *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (holding that denying prisoner medical needs constituted “unnecessary and wanton infliction of pain” that is prohibited under the Eighth Amendment).

¹²⁴ MARGALIT, *supra* note 119, at 270.

¹²⁵ *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

¹²⁶ See Steven Pinker, *A History of Violence: We’re Getting Nicer Every Day*, *NEW REPUBLIC*, Mar. 19, 2007, at 18 (tracing the decline of violence throughout the history of humankind).

¹²⁷ See, e.g., SCALIA, *supra* note 76, at 145 (expressing concern that an evolving interpretation of the Eighth Amendment “would be no protection against the moral perceptions of a future, more brutal, generation”).

¹²⁸ This is not to say that the Court’s Eighth Amendment jurisprudence can never be expected to develop in the direction of greater or more severe punishments. My own view is that at least some of the Court’s recent death penalty decisions, such as those exempting teenagers and rapists who do not kill their victims, are not well reasoned. It is thus possible that a more careful analysis of the relevant considerations might warrant a reversal of these decisions. Of course, this development would not represent the descent into barbarity that concerns Justice Scalia.

These considerations suggest the general contours of a revamped Eighth Amendment analysis. As an initial matter, the Court should pay serious attention to the justifications for punishment. In particular, it must develop, as it so far has not, a coherent account of the relevant justifications as a basis for evaluating a state's proffered rationale.¹²⁹ It must also assess the compatibility of the various justifications with one another and gauge the proportionality between crime and punishment in light of the relevant justifications.¹³⁰ This does not mean that the Court would have to conduct independent factual inquiries to determine the effectiveness of, say, deterrence, but it might require a state to do so as a basis for adopting deterrence as a penal justification. At a minimum, it seems reasonable to expect greater conceptual clarity as an aspect of meaningful constitutional analysis.¹³¹

The Court's track record of evaluating, or even articulating, the retributive rationale is especially poor, however. Although, as a general matter, the institution of liberal punishment seems incomprehensible without reference to such retributive values as desert and proportionality,¹³² the Court has been unable to consistently distinguish retribution from less savory accounts of punishment, including revenge and the need to forestall vigilantism.¹³³ As a result, it has not

¹²⁹ See generally Mary Sigler, *Contradiction, Coherence, and Guided Discretion in the Supreme Court's Capital Sentencing Jurisprudence*, 40 AM. CRIM. L. REV. 1151 (2003) (detailing the Court's confusing and inconsistent characterizations of the justifications for punishment).

¹³⁰ At least since *Harmelin v. Michigan*, 501 U.S. 957 (1991), the Court has generally not engaged in meaningful proportionality review, especially outside the death penalty context. In *Harmelin*, the Court concluded that "the Eighth Amendment contains no proportionality guarantee." *Id.* at 965. In at least some cases, however, the Court has invalidated sentences based upon a finding of disproportionality. See, e.g., *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008); *Solem v. Helm*, 463 U.S. 277 (1983); *Coker v. Georgia*, 433 U.S. 584 (1977).

¹³¹ See H.L.A. HART, *Prolegomenon to the Principles of Punishment*, in PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 2-3 (2d ed. 2008).

Yet what is said in public debates about punishment by those specially concerned with it as judges or legislators is important. Few are likely to be more circumspect, and if what they say seems, as it often does, unclear, one-sided[,] and easily refutable . . . it is likely that in our inherited ways of talking or thinking about punishment there is some persistent drive towards an over-simplification of multiple issues which require separate consideration.

Id.

¹³² See Hugo Adam Bedau & Erin Kelly, *Punishment*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (last modified Feb. 19, 2010), <http://plato.stanford.edu/entries/punishment/>.

¹³³ See Sigler, *supra* note 129, at 1178-83 (documenting Supreme Court justices' conflation of retribution with various consequentialist rationales). In its recent decision invalidating the death penalty for non-fatal child rape, the Court's opinion reflects the familiar confusion about the retributive rationale. Worrying that retribution "most often can contradict the law's own ends," the Court insists that "[w]hen the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint." *Kennedy*, 128 S. Ct. at 2650. I honestly have no idea what this means. The Court has consistently held that the death penalty is not per se unconstitutional, that retribution is a legitimate justification for punishment, and that retribution is grounded in moral culpability. It is unclear, then, what "ends" of the law retribution threatens or why capital punishment presents a special risk of a "sudden descent into brutality."

given adequate consideration to the case for retribution—the idea of punishment as intrinsically valuable regardless of whether it promotes (or undermines) other penal values. In *Kennedy*, for example, in which the Court categorically rejected capital punishment for the non-fatal rape of a child, its muddled analysis “conceptually contemplates the possibility that disproportionate punishment could be compatible with retribution; and as such, it literally makes no sense.”¹³⁴

To be sure, because retribution is a non-consequentialist rationale, it presents special interpretive challenges regarding desert and proportionality. In the death penalty context, for example, both opponents and advocates invoke the commitment to human dignity as grounds for their position. For those who oppose capital punishment, execution under any circumstances fails to respect the inherent dignity of the person. “The calculated killing of a human being by the State involves, by its very nature, a denial of the executed person’s humanity.”¹³⁵ For others, however, capital punishment is the only penalty that truly *respects* the murderer’s humanity. As Kant argued, the principle of “equality” requires that punishment match as closely as possible the offense itself.¹³⁶ In the case of a murderer, then, “he must die.”¹³⁷ For “[t]here is no sameness of kind between death and remaining alive even under the most miserable conditions”¹³⁸ As this example suggests, desert judgments are inherently controversial, and no data or metric can definitively establish the type or amount of punishment particular offenders deserve.

A more robust analysis of cruelty and decency could lead to other improvements in Eighth Amendment analysis as well. First, a serious commitment to the decent treatment of criminal offenders might result in greater judicial responsiveness to the dangerous and degrading conditions that prevail in many American prisons and jails.¹³⁹ Although the Court has already recognized that the State has an Eighth Amendment responsibility to ensure the health and safety of

¹³⁴ Hurd, *supra* note 16, at 357.

¹³⁵ *Furman v. Georgia*, 408 U.S. 238, 290 (1972) (Brennan, J., concurring).

¹³⁶ KANT, *supra* note 122, at 102.

¹³⁷ *Id.*

¹³⁸ *Id.*; see also Herbert Morris, *Persons and Punishment*, 52 MONIST 475 (1968). Morris defends a “right to be punished,” *id.* at 475–76, which follows from taking ourselves seriously as moral agents. “We treat a human being as a person provided: first, we permit the person to make the choices that will determine what happens to him and second, when our responses to the person are responses respecting the person’s choices.” *Id.* at 492. Despite the oddity of a right to something that most people do not want—punishment—Morris argues that the denial of this right entails the denial of all of our rights. For “any framework of rights and duties presupposes individuals that have the capacity to choose on the basis of reasons presented to them, and that what makes legitimate actions within such a system are the free choices of individuals.” *Id.* at 499. Morris, however, did not specifically address the issue of capital punishment.

¹³⁹ See generally Dolovich, *supra* note 118; Mary Sigler, *By the Light of Virtue: Prison Rape and the Corruption of Character*, 91 IOWA L. REV. 561 (2006).

inmates in its care,¹⁴⁰ it has developed standards of liability that leave inmates vulnerable to all but the most egregious forms of official malfeasance.¹⁴¹

Similarly, serious attention to the meaning of cruelty might justify a greater role for proportionality review outside the high-stakes context of life-and-death sentencing. In these latter cases, the Court has recognized that a punishment is excessive “if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime.”¹⁴² In this way, the Court acknowledges that it “is an established principle that decency, in its essence, presumes respect for the individual and thus moderation or restraint in the application of capital punishment.”¹⁴³ Unfortunately, despite the absence of any justification for restricting this principle to *capital* punishment, the Court has long since abandoned the project of meaningful proportionality review outside the context of life-and-death punishments.¹⁴⁴

V. CONCLUSION

The Supreme Court’s reliance on the “evolving standards of decency” has produced confusion and cynicism in Eighth Amendment jurisprudence. Although the recent trend away from the harshest punishments for certain offenders and offenses brings the United States more in line with other Western industrial democracies, the decisions themselves lack systematic engagement with the relevant legal, moral, and political values that could inform a judgment about whether the Court has reached the correct results. Instead, moved by an indeterminate mix of majoritarian and public policy considerations, the Court lurches along without apparent aim or justification.

An Eighth Amendment analysis grounded in our political morality offers the prospect of greater justice, coherence, and legitimacy in judicial decision making—but no greater certainty about particular legal outcomes. Thus, there is reason to believe that decoupling Eighth Amendment interpretation from majoritarian preferences would better safeguard the rights of society’s most unpopular individuals, that our punitive institutions and practices would more consistently reflect the relevant justifications of punishment, and that an articulation of the moral foundations of the Court’s decisions might enhance rather

¹⁴⁰ *Farmer v. Brennan*, 511 U.S. 825, 834 (1994); *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

¹⁴¹ See *Farmer*, 511 U.S. at 837; Dolovich, *supra* note 118, at 946; Sigler, *supra* note 139, at 590.

¹⁴² *Coker v. Georgia*, 433 U.S. 584, 592 (1977).

¹⁴³ *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2658 (2008).

¹⁴⁴ Compare *Solem v. Helm*, 463 U.S. 277, 284 (1983) (“The final clause [of the Eighth Amendment] prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed.”) with *Harmelin v. Michigan*, 501 U.S. 957, 965 (1991) (“[T]he Eighth Amendment contains no proportionality guarantee.”).

than threaten its institutional legitimacy. But it remains to be seen whether the political morality alternative to Eighth Amendment interpretation would produce substantive decisions different from those the Court has reached under the prevailing approach—whether the death penalty would apply more or less broadly or not at all, whether three strikes laws and other recidivism enhancements could withstand meaningful proportionality review, whether minors and other offenders with mental deficits should be entitled to categorical exclusion from the most severe punishments. In all of these cases, controversy is inevitable, but decisions articulated in terms of our political morality would help to define the parameters of reasonable debate.